No. 3988

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

J. W. DALY,
Appellant,

vs.

C. W. LONG,
Appellee.

BRIEF OF APPELLEE

On Appeal from the United States District Court for the District of Idaho, Southern Division

J. H. RICHARDS,
OLIVER O. HAGA,
McKEEN F. MORROW and
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STATEMENT OF THE CASE

In form this is a suit by Appellant to quiet title to certain mining claims. In reality, however, it is a suit to have it officially adjudged and decreed that Appellee has forfeited all rights under a contract wherein Appellant agreed to convey to Appellee an undivided one-half interest in said claims. The status of this contract is the objective of the suit, regardless of the name given the action by Appellant, and the case turns on the question of whether Appellee still has the rights originally acquired under the contract, or whether such rights have been forfeited or lost.

The District Court found in effect that Appellee, under the facts disclosed by the oral and documentary evidence, was not in default and had not forfeited his rights under the contract. The case presents no new or novel principles of law. It is merely a question of fact whether Appellee was justified in assuming from Appellant's letters, statements and conduct that the latter acquiesced in postponing the date when certain development work should be commenced. This work was to be done by the joint efforts or at the joint expense of Appellant and Appellee, and Appellee in good faith believed that Appellant not only acquiesced in the postponement of such work, but that Appellee was doing Appellant a favor by not insisting on going on with the work at a time when Appellant's letters indicated that it would be a burden to him to have to do his share or pay his one-half of the expense. As stated above, the Trial Court found the facts in favor of Appellee, and, accordingly, held that Appellant was not entitled to a decree quieting his title as against the contract between the parties to the suit, and hence dismissed the Bill.

The complaint is of the usual form to quiet title and it calls upon defendant (Appellee) "to set forth the nature of his claim" (Rec., p. 9). The prayer is such as is usually found in Bills to quiet title and among other things Appellant prays that "the defendant be forever enjoined and debarred from asserting any claim whatever in or to said mining claims", etc. (Rec., p. 9). Appellee in his answer set up the contract between the parties, dated June 24, 1918, and claims only such interest and right in and to said

mining claims as he may be entitled to under such contract, and alleges and shows that he is and always has been able, ready and willing to carry out the terms of the agreement by him to be kept and performed, and shows that the delay in doing the work had been mutually agreed to and that plaintiff "has urged and requested the postponements and delays above referred to, and said plaintiff has further from time to time urged that it was inopportune because of climatic, or financial or other local conditions to do the work at the times and in the manner contemplated by said agreement" (Rec., pp. 10-13). The agreement is attached as an exhibit to the answer (Rec., pp. 13-21).

The evidence consists largely of letters that passed between the parties. These were introduced by Appellant as part of his case in an effort to show an abandonment or default by Appellee (Rec., pp. 26-45). The property had no known value. Appellant himself says: "It is a prospect having no developed ore" (Rec., p. 45).

There is no controversy over any delay or postponement prior to the fiscal year commencing October 1, 1920. It is conceded by Appellant and his counsel that Appellant consented to and acquiesced in the development work being postponed or deferred until that date. Appellant says (Rec., p. 48):

> "That witness gave Long an extension from 1919 to 1920; that he gave him a year's extension; that the extension was given in October, 1919 by letter, in one of the letters introduced in evidence."

And counsel in his brief (bottom of page 8) says:

> "Daly's statement in October, 1919, that he would give Long an extension was treated and considered by both parties as a year's extension of the time in which Long must commence work."

It should be noted, however, that Mr. Long, on September 30, 1919 (Rec., p. 35) wrote Appellant that:

> "I am ready to fulfill my agreement with you and go ahead with the development work on the Daly Group of quartz mining claims according to our agreement on file in the County Recorder's office, providing you wish to commence work October first. You can put on a man and I will pay the bill. Will be over later on. Did you get my letter."

To which Appellant replied on October 13 (Rec., p. 36):

> "I did not put a man to work as you requested. I will give you an extension of time to carry out the agreement. *I can't work this winter on these claims and keep up my end of the expense.* Everything is very high. I am of the same opinion as you are in regard to working these claims. We should wait until we can install some kind of machinery."

Later, on February 3, 1920, Appellee again wrote to Appellant, as follows (Rec., pp. 36-37):

> "I would like to hear from you by return mail and know whether or not you are working, and if

not would you want to work any more on the claims. Providing, however, we could do anything there that is in the way of hand work and *you think it advisable to go out and go to work.* Please let me know all the particulars, that is, just what I would need to bring in the way of tools and bedding and what the probable cost of a grub stake, and where we would buy, etc. *I have some time and would like to get busy.*"

Instead of asking Appellee to come over and go to work or showing any desire to cooperate or join in doing the work, Appellant writes on February 9, 1920, (Rec., p. 37):

> "Things have not come my way since I entered into the agreement with you. I was handicapped last year on account of my hand. It cost me several hundred dollars. I have not much grip in that hand. One finger is stiff. It is my left hand. I may have to get that finger amputated yet; it is always in the way when I am working. *Now, to be candid with you, I don't believe that I will ever be able to carry out the terms of that agreement.*"

To this Appellee replies on February 18, 1920 (Rec., pp. 38-39):

> "I wrote you September 30th that I was ready to fulfill my agreement with you * * * instructing you to put on a man and proceed with the work and I would pay the bill. You wrote me saying you could not work this winter and

keep up your part of the expenses and that you had some grub that you wanted to use up before coming out and that you would be in Baker in about six weeks. * * * Now, when I entered into this agreement with you I done so in good faith with the object of helping develop same, and my faith is unshaken and am of the opinion that the claims are good and will develop into a paying mine. I am ready and willing to go ahead with my part of the agreement. I was under the impression you did not care to and could not work on the claims this winter. I do not want to give my contract up. Now, John, I realize you have had hard luck and possibly you think best not to install machinery at the present time, which possibly would be the best, but this will not keep us from doing hand work and going right ahead and sink. Providing, however, you are not able to put up for your part of the expenses, I will help you so we will be able to get along some way and develop the claims. I am figuring on getting some money out of some interests I have, and should I be able to do this I will buy what machinery we need to do this work, and you can pay your part later on. We can fix that part so you will not have to worry. I will not take any advantage of you, on the other hand I will do all I can to help you."

On July 12, 1920, while they were looking forward to doing the work for the year commencing October 1,

1920, Appellee wrote Appellant that he would be in Silver before long, saying (Rec., p. 40):

> "I can ship you a hoist from here either to run by gasoline or electricity. I think it best to install a jackhammer outfit and if you are not able to carry your part I will try and install the outfit so we can get started and you can pay for your part when you get able to take care of it * * * I have confidence in your property and intend to live up to my part of the agreement, and I will help you to live up to your part."

To this Appellant replied (Rec., p. 41):

> "I think it would be a good idea not to ship a hoist until arrangements had been made for power. Then you would know exactly what kind of a hoist to ship * * * If you are willing to put up my share of installing the machinery, I will require a written agreement when I shall pay my share."

On September 27, 1920, Appellee wrote, referring to certain delays in making a sale of some other properties, and he says (Rec., p. 42):

> "I have considered the proposition and should I make a turn or be able to get out a shipment of high grade ore, it is possible and probable I will install a power plant for hoisting and drilling, and I will make you a present of a half interest in same. * * * However, *if you want to work there this winter, go ahead and put on a man and*

hire him as reasonable as you can and start in October 1st and send the bill to me at Baker and I will pay my part, according to my agreement with you, which is on record * * * Let me hear from you soon just what you are going to do. In case you don't want to work you can give me an extension of time and I will file same."

To which Appellant replied on October 2nd, 1920:, and among other things he says:

"I do not want to stay here this winter because I am not prepared to do the work I want to do. As to hiring a man, I cannot work him to advantage."

Shortly after this letter was written Appellant gave the Banner Mining Company an option on the property, but Appellee received no notice of this until he discovered the option on the county records in May, 1921, when he went to the property to do development work (Rec., pp. 51-52).

The contract between the parties provides that:

"It is further agreed between the parties hereunto that if the said Long shall, *after proper demand by said Daly,* default in any one or more of the provisions of this contract by him hereby agreed to be observed and performed, any and all rights which the said Long shall have in and to the properties herein referred to, either under the terms of this contract or otherwise, shall at once cease and be of no effect and the rights of the said Long in and to said properties under the

> terms of this contract or otherwise shall be deemed null and void absolutely," etc. (Rec., p. 19).

The foregoing is the forfeiture provision under which Appellant claims he is entitled to a decree that Appellee has no longer any right, title or interest in the property by reason of said contract.

While the contract provides for "proper demand" by Appellant before declaring the contract at an end, there is no contention that any such demand was made, and the Trial Court found that Appellee was justified in assuming from the letters and conduct of Appellant and his statements over the telephone that he at least acquiesced in the delay. We think the letters are much stronger than that. We think they show a desire on the part of Appellant to delay the work because of his own physical and financial condition, but it is sufficient that there was a waiver by Appellant of the time provisions of the contract, and that he could not put Appellee in default without notice and "proper demand by said Daly."

It should be noted also that the agreement involved is not an "option", but an absolute obligation on the part of Appellee to do one-half the work or pay the wages of a man for doing it, and to pay one-half the cost of the equipment and supplies necessary to perform the work required to be done under the contract. The contract is one of mutual and absolute covenants. Appellant is as much bound to do his one-half of the work as Appellee is to do his share.

BRIEF OF THE ARGUMENT

A "forfeiture" is where a person loses some right, property, privilege or benefit in consequence of having done or omitted to do a certain act.

> Meyers vs. State, 47 Tex. Civ. App. 336, 105 S. W. 48.
>
> Whitney vs. Dewey (C. C. A., 9th Cir.), 158 Fed. 385.
>
> Jagoe vs. Aetna Life Ins. Co., 123 Ky. 510, 96 S. W. 598.

While this is not a case for specific performance, and while the relation of the parties to the property is such that a suit for specific performance of this contract can, perhaps, never arise, and hence any discussion of that question is beside the case, nevertheless, the contract gives to Long certain rights in and to the property which the Courts will protect and will specifically enforce when the occasion therefor arises.

> Watts vs. Kellar (C. C. A., 8th Cir.), 56 Fed. 1.
>
> 3 Pomeroy's Equity Jurisprudence (4th Ed.), Secs. 1260 and 1261 and cases there cited.
>
> Lewis vs. Hawkins, 90 U. S. 119, 23 L. Ed. 113.
>
> Conley Camera Co. vs. Multiscope & Film Co., (C. C. A., 8th Cir.), 216 Fed. 892.
>
> Baker vs Mulrooney (C. C. A., 8th Cir.), 265 Fed. 529.
>
> Ferguson vs. Blood (C. C. A., 9th Cir.), 152 Fed. 103.
>
> Nixon vs. Marr, 190 Fed. 918.

The findings and decree of a Court of Equity are presumptively right, and they should not be disturbed or modified by an Appellate Court unless an obvious error has intervened in the application of the law or some grave mistake has been made in the consideration of the facts.

> Manhattan Life Ins. Co. vs. Wright (C. C. A., 8th Cir.), 126 Fed. 82.
> Stearns-Roger Mfg. Co. vs. Brown, 114 Fed. 939, 52 C. C. A. 559.
> North American Exploration Co. vs. Adams, 104 Fed. 408, 45 C. C. A. 184.

In equity the purchaser is regarded as the owner subject to the liability for the unpaid price and the vendor as holding the legal title in trust for him. This view of the estate of the purchaser is based on the maxim that equity regards and treats as done what in good conscience ought to be done.

> 27 R. C. L. 464.
> Lewis vs. Hawkins, 90 U. S. 119, 23 L. Ed. 113.
> House vs. Jackson, 24 Ore. 89, 32 Pac. 1027.
> Smith vs. Bangham, 156 Cal. 359, 104 Pac. 689.
> Horgan vs. Russell (N. D.), 140 N. W. 99, 43 L. R. A. (N. S.) 1150.
> Pomeroy's Eq. Juris. (4th Ed.), Secs. 1260 and 1261.

A forfeiture clause is inserted in a contract to convey real property for the advantage of the vendor and as a penalty for default and such provisions are not

self-executing and do not become operative until exercised, and the Appellant Daly as a competent party to contract could waive any provision that is beneficial to him and equity leans to that construction of the evidence which will prevent the forfeiture of Long's rights.

Graham vs. Merchant, 43 Ore. 294, 72 Pac. 1088.
Pomeroy's Eq. Juris. (4th Ed.). Sec. 459.
Baker vs. Mulrooney, 265 Fed. 529.

When two people who possess the legal capacity to contract actually make a contract, if the contract is not tainted with fraud and does not contravene public policy, it is the duty of a Court of Equity, if its powers are properly invoked for that purpose, to enforce the contract in accordance with its terms.

Morton vs. Allen, 180 Ala. 279, L. R. A. 1916B 11.
Ullsperger vs. Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. (N. S.) 221.

When a vendor waives the stipulation of a contract prescribing the time of its performance, he cannot rescind without giving the vendee reasonable notice to comply with his part of the agreement.

Watson vs. White 152 Ill. 364, 38 N. E. 902.
Mullin vs. Bloomer, 11 Ia. 360.
Higby vs. Whittaker, 8 Ohio 198.
Graham vs. Merchant, 43 Ore. 294, 72 Pac. 1088.

Appellant seeks a decree relieving him from his obligations under the contract because of some alleged defaults on the part of Appellee. He seeks in effect, though perhaps not in form, a forfeiture of Appellee's rights or a rescission of the contract so that Appellant may sell the property free from every right and claim of Appellee. The burden of proving a sufficient default was on Appellant, and, seeking equitable relief, he must come into Court with clean hands and show beyond question that he has not contributed to the default or led Appellee to believe that concessions would be granted or extensions given.

4 Page on Contracts, p. 3556.
Reeves & Co. vs. Martin (Okla.), 94 Pac. 1058.
Baley vs. Homestead etc. Co., 80 N. Y. 21, 36 Am. Rep. 570.

Time was not of the essence of the contract, and the forfeiture claimed by Appellant is based on *covenant* and not on *condition*, and hence cannot be enforced in any form of proceeding, however fully it may be established.

5 Page on Contracts, Sec. 2579.
Diefenbrock vs. Luiz, 159 Cal. 716, 115 Pac. 743.

ARGUMENT

There is but a single question involved in this case, and that is whether or not Appellee has lost his rights under the contract of June 24, 1918, under which Appellee was to have a half interest in the property and for which in turn he obligated himself to perform

certain work and pay one-half of the cost of certain equipment. It was not an option, but an absolute unqualified agreement on the part of Appellee to assume obligations that would amount in the aggregate to a large sum. For this personal liability and for these obligations, he was in turn to receive an undivided one-half interest in "a prospect having no developed ore" (Rec., p. 45).

The contract is no different in law than if Appellee had agreed to pay $10,000 for an undivided one-half interest, such payment to be made at a stipulated time or times in the future.

The adroit and specious argument of counsel for Appellant about specific performance and the uncertainty of the contract is beside the case. No one is asking specific performance and no occasion can arise hereafter for specific performance of this contract. When Appellee has performed his part, he can go to the escrow holder and receive the deed which was placed in escrow by Appellant. If Appellee fails to perform, Appellant may either rely upon his default and the forfeiture of his interest, or he may sue him and recover a personal judgment for his failure to perform or pay for the labor, material and equipment that he was to furnish under the contract. Counsel is wrong, however, in saying that such contracts will not be protected by Courts of Equity.

> "Every tract of realty is in a way unique. No amount of money will enable one to acquire a given tract for a private purpose without the consent of the owner thereof. It follows that a con-

> tract to convey realty is one the breach of which cannot be compensated for adequately by money damages. Specific performance of such contracts is therefore regularly given by equity if the other elements of the contract are such as to make this remedy proper."
>
> 6 Page on Contracts (2d Ed.), Sec. 3325.

Courts are now more liberal than heretofore in granting specific performance of contracts relating to realty and the cases are numerous where construction contracts have been specifically enforced, it being assumed that in the absence of specifications common usage and the ordinary practice in the matters involved are a part of the contract.

> "It is a well established rule that where a party agrees to do a certain thing and does not specify how it shall be done, the law implies a promise on his part to do it in the usual manner, and that it shall be complete and effectual for the use to which the same kind of thing is generally applied, etc."
>
> Lane vs. Pac. Etc. Ry. Co., 8 Ida. 230, 238, 67 Pac. 656.

A very full review of the authorities on this subject will be found in Brown vs. Western Md. Ry. Co. (W. Va.), 99 S. E. 457, 4 A. L. R. 522.

We have merely cited these authorities to show that this is not a case in which the Court should deny specific performance if that question were properly before it.

The contract in question contains all the essential elements of a binding contract. The parties were competent to contract, The subject-matter and the consideration are within the law. It is axiomatic that the mere fact that a contract is incapable of being specifically enforced, even if that question were before the Court, cannot affect its validity or binding effect. The rule is concisely stated in 25 R. C. L.,p. 205, as follows:,

> "In refusing specific performance of a contract the decision is limited to the question of its enforceability in equity, leaving open the inquiry as to its binding effect at law. Accordingly, it is well settled that a Court of Equity may refuse specific performance of a contract, although at the same time it would refuse to set it aside."

It is unnecessary to cite authorities in support of this proposition.

The contract contains mutual covenants. Appellee showed due consideration for the rights of Appellant when he attempted to ascertain whether it would be convenient for Appellant to work and to furnish his share of the expense.

Appellee perhaps had the right to ignore Appellant's wishes as to when it would be convenient for the latter to commence work, but on the contrary he sought in every way to plan the work so as to meet Appellant's convenience and he should not be penalized for so doing. Appellant's letters clearly show that he was physically incapacitated to do his share of the work and was financially unable to bear his share of the expense during certain periods when Appellee was de-

sirous of working or putting a man in his place. At other times Appellant was disinclined for reasons which were neither real nor substantial. The plain truth of the matter is that Appellant in the summer and fall of 1920 conceived the idea of selling the property to the Banner Mining Company if he could eliminate Appellee from his contract. This proposed deal he did not disclose to Appellee, although the latter was in fact his partner, as the contract clearly shows they were to share both in the losses and the profits from the development of the property and the shipment of ore. As soon as Appellant thought he had Appellee in default, but without any notice to Appellee of his intention so to do, he enters into a contract to sell the property to the Banner Mining Company, and presumably this deal meant greater profit to Appellant. The record shows he never discussed this matter with his partner, but attempted to keep him entirely in the dark, at least until he thought he had him firmly eliminated from the contract.

Counsel for Appellant in a most ingenious way leads the discussion into the realm of sophistry and draws mental pictures of imaginary controversies over the uncertainties of the contract, and then shifts quickly to the inability of the Court to grant specific performance because of such uncertainties, and then concludes that the contract is *void because the Court cannot grant specific performance.*

There was never any controversy between Appellant and Appellee over the meaning of the contract. To them it was perfectly clear. They knew exactly what it meant. They were practical miners and they had

used mining terms—terms with which they were entirely familiar, and their correspondence shows, as does their testimony, that there was no delay because of imperfect or incomplete specifications in the contract. The work to be done is described in sufficient detail for any practical miner (Rec., p. 16). Appellant represented, and it is unquestionably a fact, that in the main tunnel on the property there was already a shaft or winz 50 feet deep. The new work was to start at the bottom of that shaft, and it was agreed that: (a) "said shaft shall be sunk 50 feet so as to make a level at a distance of 100 feet below the present main tunnel"; (b) from the bottom of this shaft on the new level 100 feet below the old tunnel, "a tunnel shall be cross cut to the vein". All practical miners understand just what that means; and (c) after striking the vein "said parties shall drift upon this vein for 50 feet each way from the cross cut", and this being done, (d) "said shaft or winz shall then be sunk 100 feet", and (e) at this point "another cross cut shall be run from such point to the vein", and (f) having struck the vein the parties shall drift "50 feet each way from said cross-cut."

As stated before, the parties themselves had no misunderstanding or controversy over where or how the work was to be done. By way of illustration we simply refer to one letter of Appellant written a year and a half after the contract was executed (Rec., p. 36), in which he says: "I am of the same opinion as you are in regard to working these claims." And in February, 1920, Appellee writes (Rec., p. 39): "I will help you so we will be able to get along some way and develop the claims * * * I will buy what machinery we

need to do this work. And you can pay your part later on. We can fix that part so you will not have to worry. I will not take any advantage of you, on the other hand I will do all I can to help you" * * *. And so throughout the correspondence there is manifested a fine sense of honor and good faith on the part of Appellee—a desire to help appellant to bear his share of the expense by advancing the money for the machinery and other expenses, but there is no evidence whatever of any misunderstanding as to where the work was to be done, or the amount of work, or the kind or character of work. As to such matters, as said by the Supreme Court of Idaho in Lane vs. Pacific Etc. Railway Co., 8 Idaho 230, the law implies that it will be done in the usual manner and that it shall be effectual to the use for which it is designed.

It would be manifestly absurd to make the specifications so in detail that nothing would be left to common sense and to the rule of common usage and custom. Counsel might as well argue that the contract is uncertain because it does not state at what hour in the morning both parties shall commence work, or the time they shall lay off for lunch, or whether they shall work on day shifts or night shifts, and that, hence, the contract cannot be carried out because they may not both agree to work during the same shifts, or that they may both insist on working in the same place at the same time. Under this agreement the parties became in effect partners in this property and each agreed to do his share, and, among other things, they agreed (Rec., p. 17), "That any ore of sufficient value shall be disposed of in such manner as shall seem most advan-

tageous to both parties, and the net receipts thereof shall be credited one-half to each of the parties hereto."

What was said by this Court in Whitney vs. Dewey, 158 Fed. 385, applies to the conduct of the Appellant in this case in secretly attempting to sell the property to the Banner Mining Company without notifying Appellee. This Court said:

> "There are some principles which are thoroughly well established that bear upon the case, and will furnish grounds of equity and law upon which our decision must be based. The first and highest duty which partners owe to each other is perfect good faith. Each is under obligation to do what he can to promote the success of the partnership. In every purchase or bargain each is under a duty to use the property of the concern for the benefit of all. In the requirement of good faith between partners, naturally, deceit, concealment, and false representations are forbidden."

We deem it unnecessary to consider individually or separately the cases cited in Appellant's brief. We have no particular quarrel with the law as announced in those cases. But counsel has attempted to apply— them to a state of facts to which the Court that rendered the decisions never intended they should be applied. Neither do we deem it necessary to discuss the fine-spun theories advanced by counsel to show that under the contract in question Appellee acquired no rights whatever of which a Court of Equity can take cognizance.

It might well be asked, why did Appellant bring a suit to quiet title if the contract is so absolutely ineffectual to vest any right in Appellee to this property? We shall quote from some of the authorities merely to show the practical view which Courts take of these contracts as contra-distinguished from the metaphysical theories by which counsel for Appellant disposes of the contract and the rights of Appellee.

Pomeroy in his work on Equity Jurisprudence, Secs. 1260-1261, 4th Ed., discusses the underlying principles of contracts such as the one now before the Court. In the note to these sections, after quoting from a number of the English and American authorities, he says:

> "These extracts show that the ablest judges have found it very difficult to formulate a statement which should exactly reconcile the idea of vendor having merely a lien with the notion of his being a trustee. In the recent case of Lysaght vs. Edwards, L. R. 2 Ch. Div. 499, 506, 507, Sir George Jessel, M. R., states the effect of a contract for the sale of land as follows: 'It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Harwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor hav-

ing a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz, the possession of the estate, and a charge upon the estate for his purchase money. Their positions are analagous in another way. The unpaid mortgagee has a right to foreclose,—that is to say, he has the right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate', and in default of payment he becomes absolute owner of it. So although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, 'Either pay me the purchase money or lose the estate.' Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of Equity; and if the time expires without the money being paid, the contract is canceled by the decree of judgment of the Court, and the vendor becomes again the owner of the estate (i. e., equitable as well as legal owner). But that, as it appears to me, is a totally different thing from the contract being canceled, because

there was some equitable ground for setting it aside. The judge goes on to discuss the meaning of 'valid contract' for the sale of land, when such contract is valid and binding, and then proceeds: 'Being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase, it is at the risk of the purchaser. If it is a house that is sold, and the house is burned down, the purchaser loses the house. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and *more* than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject, of course, to his right to be paid the purchase money and his right to enforce his security against the estate.' See also Morgan vs. Swansea etc. Authority, L. R. 9 Ch. Div. 582, 584. To these admirable expositions nothing need be added

by way of comment. They show that the notion of the vendor's lien is simply another mode of expressing the settled doctrine of conversion wrought by a contract for the sale of land. In equity the vendee is regarded as the real beneficial owner, *even though he has not paid the purchase price*; the vendor holds the legal estate as trustee, and when the terms of the contract are complied with, he is bound to convey. Until those terms are complied with, the legal title remains in the vendor as his security; or, as it is otherwise expressed, he has a lien upon the vendee's equitable estate as security for payment of the purchase money according to the terms of the agreement. Practically, this lien consists in the vendor's right to enforce payment of the price, by a suit in equity against the vendee's equitable estate in the land, instead of by means of an ordinary action at law to recover the debt." (Our italics.)

In 27 R. C. L. 464, under the title "Purchaser's Interest as Viewed in Equity; Rule Stated", the author says:

"In equity the purchaser is regarded as the owner subject to the liability for the unpaid price and the vendor as holding the legal title in trust for him. This view of the estate of the purchaser is based on the maxim that equity regards and treats as done, what, in good conscience, ought to be done."

A long list of authorities is cited in support of the text, including Lewis vs. Hawkins, 90 U. S. 119, 23 L. Ed. 113.

The Circuit Court of appeals for the Eighth Circuit in Watts vs. Kellar, 56 Fed. 1, in directing specific performance of an option contract, says:

> "An option to sell land is as valid as an option to buy. When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property; and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed, and pay the price. Such contracts are perfectly valid, and it is now well settled that a Court of Equity may decree a specific performance of them. * * * Cases may be found which hold that such contracts will not be specifically enforced, because the right to a specific enforcement is not mutual. The want of mutuality of right to a specific performance of a contract, which sometimes precludes its enforcement in equity, has no application to an option contract of the character we are considering. The purchaser of an option to buy or sell land pays for the privilege of his election. It is that very privilege which the other party to the contract sells * * * An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right

> to have them specifically enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but, if he cannot do this, and must resort to an action at law for damages, his option in most cases will be of little or no value, no man of any experience in the law would esteem an option or a law suit for an uncertain measure of damages as of any value."

The same Court, in Baker vs. Mulrooney, 265 Fed. 529, enforced an option for the purchase of mining stock for which no consideration was paid and in which Mulrooney had agreed to sell to Baker his stock for $180,321, and Baker, before the option expired, resold the stock at a profit of $161,554. The Court considers at length the status of options and the duty of the Court to protect the rights of parties under option contracts. The Court says:

> "The liability of Baker to take the stock under the Mulrooney option was immaterial. He did not agree to take it in the option, yet he had the right to take it if he so desired under its terms. So that it cannot be said that Baker was playing fast and loose with Mulrooney * * *. It is also immaterial, so far as the validity of the option is concerned, whether Baker was a millionaire or was insolvent. * * * In the commercial world these options are taken as a general rule by men who have not the money to pay for the property sold, but intend to make it by a re-

> sale. * * * Baker was doing nothing but what he had a legal right to do. That he made a large profit has nothing to do with the case, except it no doubt was the cause of this law suit."

To the same effect is Conley Camera Co. vs. Multiscope & Film Co., decided by the same Court, 216 Fed. 892.

The Supreme Court of North Dakota, in Horgan vs. Russell, 140 N. W. 99, 43 L. R. A. (N. S.) 1150, reviews at length the authorities on the question of specific performance of option contracts for the purchase of real estate. The Court says:

> "Defendant contends that the option, unaccepted at the time of the sale, amounted only to a mere offer to contract, and passed no right to make subsequent acceptance, or to the land itself; that the offer was wholly executory and prospective, and could not amount to a right or interest in the land enforceable in equity. This appears plausible, but it does not have the support of authority. This is well summarized in Smith vs. Bangham, 156 Cal. 359, from page 365, 28 L. R. A. (N. S.) 522, 104 Pac. 689, of which we quote, concerning the said question: 'It has been said that an option to purchase the land does not, before acceptance, vest in the holder of the option an interest in the land. Richardson vs. Hardwick, 106 U. S. 252, 27 L. Ed. 145, 1 Sup. Ct. Rep. 213; Gustin vs. Union School Dist., 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; Phoenix Ins. Co. vs. Kerr, 66 L. R. A. 569, 64 C. C. A. 251, 129 Fed.

723. On the other hand, there are cases holding that the grant, on a valuable consideration, of an option to purchase, constitutes the grantee the equitable owner of an interest in the property. House vs. Jackson, 24 Ore. 89, 32 Pac. 1027; Kerr vs. Day, 14 Pa. 112, 53 Am. Dec. 526; Telford vs. Frost, 76 Wis. 172, 44 N. W. 835; Wall vs. Minneapolis, St. P. & S. Ste. M. R. Co., 86 Wis. 48, 56 N. W. 367. At any rate the option vests in the grantee the right or privilege of acquiring an interest in the land, and when accepted entitles him to call for specific performance. Hawralty vs. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; Kerr vs. Day, 14 Pa. 112, 53 Am. Dec. 526; People's Street R. Co. vs. Spencer, 156 Pa. 85, 36 Am. St. Rep. 22, 27 Atl. 113; Guyer vs. Warren, 175 Ill. 328, 51 N. E. 580. Such right, when exercised, must necessarily relate back to the time of giving the option (People's Street R. Co. vs. Spencer, supra), so as to cut off intervening rights acquired with knowledge of the existence of the option. A subsequent purchaser with notice of a valid and irrevocable option would certainly take subject to the right of the option holder to complete his purchase. Barrett vs. McAllister, 33 W. Va. 738, 11 S. E. 220; Sizer vs. Clark, 116 Wis. 534, 93 N. W. 539; Kerr vs. Day, 14 Pa. 112, 53 Am. Dec. 526.' To which we may add the note to Smith vs. Bangham, supra, also reported in 156 Cal. 359, 104 Pac. 689, found in 28 L. R. A. (N. S.) at page 522; Cummins vs. Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881, 1 Ann. Cas.

> 986 and note; and 39 Cyc. 1244, reading: 'It has been held that acceptance of an option takes effect on the date of the acceptance, and binds the party only to the conveyance of the property in its present condition. On the other hand, it is held that acceptance of an option and performance of the conditions entitle the holder of the option to call for performance as of the date of the giving the option, so as to cut off intervening rights acquired with knowledge of the existence of the option'—citing authority. And the cases cited above as to the contrary are really not opposed to these principles. Richardson vs. Hardwick, 106 U. S. 252, 27 L. Ed. 145, 1 Sup. Ct. Rep. 213, holds merely that a written option never accepted, and never amounting to a contract, creates no interest in real property."

The Supreme Court of California, in Smith vs. Bangham, 156 Cal. 359, 104. Pac 689, 28 L. R. A. (N. S.) 522, had before it the question of specific performance of an option to purchase. The Court says:

> "The agreement signed by the parties on December 26, 1905, was a unilateral agreement, of the kind usually known as an option. By its terms Smith was under no obligation to purchase the land or to pay for it. He was granted the right or privilege of purchasing upon certain terms, within a given time. Until he should have exercised this option he was in no way bound by the agreement. His election to accept and exercise the option within the time limited was, however,

sufficient to bind him and to remove any objection to the enforcement of the contract on the ground of want of mutuality. Hall vs. Center, 40 Cal. 63; Ballard vs. Carr, 48 Cal. 74; Calanchini vs. Branstetter, 84 Cal. 249, 24 Pac. 149; Thurber vs. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Sayward vs. Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44; House vs. Jackson, 24 Ore. 89, 32 Pac. 1027. The option had at least the force of an offer to sell, and the acceptance of this offer before it had expired or had been revoked constituted a valid and binding contract, from which neither party could recede. 29 Am. & Eng. Enc. Law, 2d ed., p. 601; Vassault vs. Edwards, 43 Cal. 458; Benson vs. Shotwell, 87 Cal. 49, 25 Pac. 249. * * *

"It has been said that an option to purchase land does not, before acceptance, vest in the holder of the option an interest in the land. Richardson vs. Hardwick, 106 U. S. 252, 27 L. Ed. 145, 1 Sup. Ct. Rep. 213; Gustin vs. Union School Dist., 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; Phoenix Ins. Co. vs. Kerr, 66 L. R. A. 569, 64 C. C. A. 251, 129 Fed. 723. On the other hand, there are cases holding that the grant, on a valuable consideration, of an option to purchase, constitutes the grantee the equitable owner of an interest in the property. House vs. Jackson, supra; Kerr vs. Day, 14 Pa. 112, 53 Am. Dec. 526; Telford vs. Frost, 76 Wis. 172, 44 N. W. 835; Wall vs. Minneapolis, St. P. & S. Ste. M. R. Co., 86 Wis. 48, 56 N. W. 367. At any rate the option

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The Supreme Court of Oregon in House vs. Jackson, 24 Ore. 89, 32 Pac. 1027, in enforcing specific performance of an option contract, says:

"The option having been given to Haley, could he transfer his right so that his assignee could enforce the same? The ground upon which a Court enforces an executory contract for the sale of lands is that equity considers things agreed to be done as actually performed, and when an agreement has been made for the sale of lands the vendor is deemed the trustee of the purchaser of the estate sold; and the purchaser, trustee of the purchase money for the vendor. The vendee in equity is

actually seized of the estate, and as a consequence, may sell the same before a conveyance has been executed, notwithstanding an election to complete the purchase rests entirely with the purchaser. Kerr vs. Day, 14 Pa. St. 112. Haley had an estate in the premises and was equitably the owner thereof, and could transfer this right, and his assignee can enforce the option to the same extent as his assignor."

The Supreme Court of Alabama, in Morton vs. Allen, 180 Ala. 279, 60 So. 866, L. R. A. 1916 B 11, in answering the contention that specific performance should not be decreed unless the contract was fair and based upon an adequate consideration, says:

"When two people who possess the legal capacity to contract actually make contract, if the contract is not tainted with fraud and does not contravene public policy, it is the duty of a Court of Equity, if its powers are properly invoked for that purpose, to enforce the contract in accordance with its terms."

The Supreme Court of Illinois in Ullsperger vs. Meyer, 217 Ill. 262, 75 N. E. 482, 2. L. R. A. (N. S) 221, in reversing the Trial Court and directing specific performance of the contract and in answer to the contention that the consideration was inadequate, says:

"The contention that the sum of $14,000 was an inadequate consideration, and that specific performance was properly refused for that reason, we regard as untenable. The consideration was

that agreed upon between the parties, as shown by the contract, and the allegations of the bill * * * Mere inadequacy of consideration, if agreed upon by the parties without fraud, would not be sufficient to defeat a decree for specific performance. The owner of the property has the right to sell it, or contract to sell it, for such price as he sees fit and is satisfied to fix; and if he does sell or agrees to sell for a valuable consideration, although it may be inadequate, and no advantage was taken of him or the consideration fixed through fraud or misrepresentation, he cannot, when he finds that the property is worth more than he agreed to take or sell for, rescind the sale or refuse to perform.

"It is urged that this contract lacks in the material element of mutuality. The particular ground upon which this contention is based is that the contract is signed by appellee only. It is found in option contracts and unilateral contracts generally that the rule here contended for has no application. That the mere verbal acceptance by the second party to the contract, or the vendee, or the person holding the option, with notice thereof to the vendor, and an offer to perform, renders the contract mutual and binding."

It will be noted that the contract provides (Rec., p. 15):

"It is further agreed that the fiscal year for doing such work in the developing and opening up of said properties, shall begin on the first day

> of October of each year, *with the above reservations as to unforeseen and unavoidable contingencies*, and it is further agreed that at least six months of such work in so developing and opening up said properties shall be by said parties done during such fiscal year."

Manifestly, the above provision contemplated postponement of the work upon contingencies and hence does not make time the essence of the contract. In connection with this clause there should be read the other clause (Rec., p. 19) that:

> "It is further agreed between the parties hereunto that if the said Long shall, *after proper demand by said Daly*, default in any one or more of the provisions of this contract by him hereby agreed to be observed and performed," etc.

Clearly, this contract contemplated that before default could be declared there should be "proper demand by said Daly" made upon Long to perform the work. No such demand was ever made, and it is not contended by counsel that any such notice or demand was ever given. On the contrary, there was a clear waiver by Appellant and acquiescence in the postponement.

Counsel is wrong in his argument on the law of waiver. The rule which he contends for is limited to cases where the waiver happens to be one of the consequences of estoppel. In 27 R. C. L., p. 905, this distinction is pointed out:

> "The terms 'estoppel' and 'waiver' are sometimes loosely used interchangeably, but though a

waiver may be in the nature of an estoppel and maintained on similar principles, they are not convertible terms, and the distinction between them is one easy to preserve when express waivers are under consideration. As already seen, a waiver is an intentional relinquishment, while the indispensable elements of an estoppel are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance on that representation."

See also the very full discussion of this subject in 5, Page on Contracts (2d Ed.), p. 4672. See also 5, Page on Contracts, Sec. 2970, as to the necessity of Appellant tendering performance on his part before he can place Appellee in default.

The Supreme Court of Oregon, in Graham vs. Merchant, 43 Ore. 294, 72 Pac. 1088, considered the question of waiver of strict performance in a contract where time was expressly declared to be of the essence of the contract. The Court says:

"A forfeiture clause is inserted in a contract to convey real property for the advantage of the vendor, and, as a competent party may waive any provision that is beneficial to him, a mere option to declare a forfeiture is not self-executive and hence does not become operative until exercised. (Citing authorities). When a vendor abandons his contract to convey, the vendee, in his choice of remedies, may elect to rescind the contract, and thereupon maintain an action at law to re-

cover what he has paid thereon, as money had and received. (Citing authorities). This theory was adopted by plaintiff's counsel, who maintained that if the money received by the defendant after March 15, 1899, was accepted by him as a payment on the purchase price of the land, *he could not thereafter declare a forfeiture, except upon a demand and notice*, and, this being so, no error was committed in refusing to give the instruction requested. * * * It remains to be seen whether, after such election, he could rescind the contract without giving notice. 'The law,' says Mr. Justice Wood in Higby vs. Whittaker, 8 O. 198, 'requires some positive act by the party who would rescind, which shall manifest such intention, and put the opposite party on his guard, and it then gives reasonable time to comply; but it requires eagerness, promptitude, ability and disposition to perform, by him who would resist a rescission of his contract.' In Mullin vs. Bloomer, 11 Ia. 360, it is held that a vendee cannot rescind his contract for the conveyance of real estate without the performance of some act which will give the vendor notice of his intention and put him on his guard * * *. In Watson vs. White, 152 Ill. 364, 38 N. E. 902, it was held, that *where time is stated to be of the essence of a contract to convey land, if both parties, by mutual course of conduct, treat the time clause as waived or suspended, one of them cannot suddenly insist upon forfeiture, but must, in order then to avail himself of the time clause, give reasonable, definite, and specific notice of his changed*

> *intention.* When a vendor waives the stipulation of a contract prescribing the time of its performance, he cannot rescind without giving the vendee reasonable notice to comply with his part of the agreement" (citing authorities).

The record fully justifies the conclusion of the learned Judge that:

> "To say the least the conduct and attitude of the plaintiff in respect to proceeding with the prospect were equivocal. There is no clear expression of a desire upon his part that defendant should go ahead, and thus incur expenses which both parties must under the terms of the agreement share * * * At times he made it clear that he did not feel financially able to contribute, and hence was unwilling that anything be done. It may very well be that the defendant was in doubt as to his wishes, and it may further very well be that had he unequivocally expressed a desire that the contract plan be carried out, the defendant would have met the demand. Upon the whole, I do not feel warranted in finding that the defendant forfeited his right."

Wherefore, we respectfully submit that the decision of the District Court should be affirmed.

Respectfully submitted,

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